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Administrative Adjudication in Kentucky: Ethics and Unauthorized Practice Considerations

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ADMINISTRATIVE ADJUDICATION IN KENTUCKY: ETHICS AND UNAUTHORIZED PRACTICE CONSIDERATIONS

by Richard H. Underwood¹

I. INTRODUCTION

This article is an extended version of a presentation I made at a training course for hearing officers sponsored by the Office of the Attorney General, Division of Administrative Hearings.² In my original presentation, I was asked to focus on the ethics of the administrative adjudicator. I was asked to answer some specific questions, which I will include here for the reader's benefit. In this more complete treatment, I would also like to discuss the ethics of lawyers and other representatives appearing before administrative agencies.³

The Kentucky Courts had begun to "judicialize" the administrative hearing process in the early 1970's,⁴ but it was not until 1996 that Kentucky put into effect a general administrative hearing procedures act⁵ outlining "standardized minimum procedural protections."⁶ This important development

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² Richard H. Underwood, Address at *Administrative Hearings Before State Boards And Agencies* Frankfort, Ky. (June 29, 2001).

³ For a similar treatment, see L. Harold Levinson, *Professional Responsibility Issues in Administrative Adjudication*, 2 BYU L. PUB. L. 219 (1988) [hereinafter Levinson]. See also Harold Marquis, *An Appraisal Of Attorney's Responsibilities Before Administrative Agencies*, 26 CASE W. RES. L. REV. 285 (1976).

⁴ See, e.g., *Kaelin v. City of Louisville*, 643 S.W.2d 590 (Ky. 1971) (parties in an administrative proceeding must have an opportunity to examine and present evidence, and cross-examine witnesses); *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298 (Ky. 1972) (an administrative decision must be based on "substantial evidence"); *Big Sandy Community Action Program v. Chaffins*, 502 S.W.2d 526 (Ky. 1973) (an agency decision must be based on legally competent evidence). The notion that hearing officers and agency lawyers perform judicial or adjudicatory functions that entitle them to absolute immunity was recognized in *Butz v. Economou*, 438 U.S. 478 (1978). See also *Watts v. Burkhart*, 978 F.2d 269, 273 (6th Cir. 1992) ("state officials subject to restraints comparable to those imposed by the Administrative Procedure Act and performing adjudicatory functions in resolving potentially heated controversies are entitled to absolute immunity from damages liability for their judicial acts").

⁵ See KY. REV. STAT. ANN. §§ 13B.005-.170 (Michie 1996 and Supp. 2000).

⁶ See generally Susan S. Durant, *Procedural Due Process Past Due: Kentucky's Uniform Administrative Hearing Procedures Act Goes Into Effect*, KENTUCKY BENCH & BAR, Winter 1997, at 6, 8 [hereinafter Durant]. For an excellent handbook on the Kentucky APA see MATTHEW MOONEY, KENTUCKY ADMINISTRATIVE PROCEDURES ACT: KRS 13B ANNOTATED (UK/CLE 2000). See also KENTUCKY ADMINISTRATIVE LAW (UK/CLE 1999) [hereinafter KENTUCKY ADMINISTRATIVE LAW].

has encouraged participants in the administrative process to take more seriously considerations of professionalism.⁷

II. THE ETHICS OF THE ADJUDICATOR

A. Institutional Bias

Claims of conflict of interest or unethical conduct on the part of the adjudicator or hearing officer are usually couched in terms of bias.⁸ Before addressing the subjects of personal bias and disqualification of the individual hearing officer, some mention should be made of institutional or structural bias.⁹

Administrative officials work for the executive branch of government, and their administrative work may involve legislation, rule-making, prosecution, or quasi-judicial adjudication.¹⁰ Needless to say, the degree of "fairness" required may vary according to the type of decision being made by or within the agency.¹¹ When the proceeding is quasi-judicial, there will be a natural tendency to draw an analogy between the administrative decision-maker and a judge.¹² However, the analogy is not exact.¹³ We cloister our judges. Judges are supposed to be apolitical and detached. Can the same be said of administrative adjudicators?¹⁴

Some administrative adjudicators are elected officials whose positions also involve lawmaking, rule-making and executive functions. Investigatory, prosecutorial and quasi-judicial functions are often combined in the same agency.¹⁵ In the majority of states, the traditional model for adjudication has been the agency staff system in which the adjudicator is an employee of the agency. The adjudicator's rulings are recommendations subject to review and modification by the agency.¹⁶ Proceedings may be more inquisitorial than might

⁷ Presentations made during the Attorney General's training course for hearing officers included discussions of professionalism, discipline and order in the hearing, and ethics, as well as updates in the law of evidence. See *supra* note 2 and accompanying text.

⁸ See generally ALFRED AMAN, JR. & WILLIAM MAYTON, ADMINISTRATIVE LAW § 8.5.6 (1993) (discussing personal bias and prejudgment) [hereinafter AMAN].

⁹ The terms "institutional bias" and "structural bias" are used by Alfred Aman, Jr. & William Mayton. See AMAN, *supra* note 8, § 8.5.5. See also RICHARD FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES, § 30.8.1 (1996) [hereinafter FLAMM].

¹⁰ See generally AMAN, *supra* note 8, § 15.1 (Administrative Agencies and the Executive Branch - Introduction).

¹¹ Compare AMAN, *supra* note 8, § 8.1 (Overview of Formal Agency Adjudication) with AMAN, *supra* note 8, § 9.1 (Overview of Informal Agency Adjudication). See also AMAN, *supra* note 8, § 7.6.4 (Post-Goldberg: The Emergence of Alternatives to Trial-Type Procedures) (considering due process requirements of various agency actions).

¹² See, e.g., AMAN, *supra* note 8, § 8.5.2 (The Administrative Law Judge). See also AMAN, *supra* note 8, § 8.5.5 (citing *Withrow v. Larkin*, 421 U.S. 35 (1975), wherein Justice White compared administrative processes [presided over by agency decision-makers] to criminal processes [presided over by judges]).

¹³ See, e.g., AMAN, *supra* note 8, § 8.1.

¹⁴ See generally AMAN, *supra* note 8, §§ 8.1 and 8.5.5.

¹⁵ See AMAN, *supra* note 8, § 8.5.4.

¹⁶ See AMAN, *supra* note 8, § 8.1.

be the case in judicial proceedings. Agencies have statutory mandates and goals, and the adjudicator or hearing officer will presumably be expected to develop the record in such a way as will carry out the statutory mandate.¹⁷ Finally, "both of the traditional justifications for administrative adjudications – administrative expertise and the avoidance of the cumbersome machinery of a court trial – necessarily imply that administrative adjudicators will possess a certain degree of prior knowledge and consequent prejudgment of matters of law and policy."¹⁸

"[T]he case law generally rejects the proposition that a combination of functions in one agency necessarily creates an unconstitutional risk of bias, or that such a combination automatically constitutes a denial of due process such as to warrant disqualification of the involved administrative adjudicator."¹⁹ On the other hand, when functions are combined in a single individual, the case for disqualification for "unfairness" or bias is stronger.²⁰ How can an administrative adjudicator deal fairly with a party or parties if he or she has performed other functions – investigatory or prosecutorial – in the same matter?²¹ As we shall see, the federal APA and Kentucky APA recognize and deal with this problem by requiring a separation of functions within the agency.²²

To deal with the perception of institutional or structural bias (when functions are combined within the same agency), some states have moved away from an agency staff model to a central panel model, in which an independent managing agency is created to handle administrative hearings.²³ Separating the adjudicator (administrative law judge or hearing officer) from the agency makes the process appear fairer and more objective.²⁴ However, there are costs, which

¹⁷ Karen Lewis, *Administrative Law Judges and The Code of Judicial Conduct: A Need for Regulated Ethics*, 94 DICK L. REV. 929, 947 (1990).

¹⁸ FLAMM, *supra* note 9, § 30.5.5, at 945-46 (citing *Wagner v. Jackson Cty. Bd. of Zoning Adj.*, 857 S.W.2d 285, 289 (Mo. App. 1993) and *Bougham v. Bd. of Engineering Examiners*, 611 P.2d 670 (Or. Ct. App. 1980)).

¹⁹ FLAMM, *supra* note 9, § 30.8.1, at 958 (citing *Withrow v. Larkin*, 421 U.S. 35, 65 (1975) and *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Education Assn.*, 426 U.S. 42 (1976)). See also *Nicholson v. Judicial Retirement and Removal Comm'n.*, 562 S.W.2d 306, 309 (Ky. 1978); *Cabinet for Human Resources, Dept. of Health Servs. v. Kanter*, 898 S.W.2d 508, 512 (Ky. Ct. App. 1995); *Jones v. Cabinet for Human Resources, Div. for Licensure and Regulations*, 710 S.W.2d 862, 865 (Ky. Ct. App. 1986). The Model Code of Ethics of the National Association of Hearing Officers, Section III, states that "the hearing official should not withdraw from a proceeding if the hearing officials' impartiality is challenged solely on the basis that the hearing officials are employed by an agency appearing in the proceeding." MODEL CODE OF ETHICS § III (3) (Nat'l Ass'n of Hearing Officers), available at <http://www.naho.org/code_of_ethics.htm>.

²⁰ See, e.g., *Grolier, Inc. v. F.T.C.*, 615 F.2d 1215 (9th Cir. 1980), *appealed after remand*, 699 F.2d 983 (9th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983) (precluding ALJs from hearing a case if they had actually performed investigative and prosecutorial functions in the same or factually related cases).

²¹ See *id.*

²² See generally FLAMM, *supra* note 9, § 30.8.3.

²³ See, e.g., Judge William Sherill, *The Florida Division of Administrative Hearings*, 75 FLA. B. J. 22 (2001); David Heyndericks, *Finding Middle Ground: Oregon Experiments with a Central Hearing Panel for Contested Case Proceedings*, 36 WILLIAMETTE L. REV. 219 (2000); Jay ByBee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 LA. L. REV. 431 (1999); Christopher McNeil, *Due Process and the Ohio Administrative Procedure Act: The Central Panel Proposal*, 23 OHIO N.U. L. REV. 783 (1997); Allen Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75 (1994).

²⁴ See AMAN, *supra* note 8, § 8.5.2.

may include a loss of the "expertise" previously alluded to.²⁵ Again, this is all part of the movement to further "judicialize" the administrative process.²⁶

In Kentucky, KRS Chapter 13B created a Division of Administrative Hearings²⁷ to provide a limited number of separately housed and independent hearing officers who can be used by agencies.²⁸ This looks very much like a small central panel.²⁹ It will be interesting to see if this panel grows and replaces other agency employed hearing officers in the future. Some agencies, like the Natural Resources and Environmental Cabinet, the Cabinet for Human Resources, and the Department of Worker's Claims, have their own "cluster" of hearing officers.³⁰ KRS 13B.030(2) also authorizes agencies to employ private attorneys to serve as hearing officers.³¹

B. Individual Bias

It is probably fair to say that in the absence of statutory guidance some courts have been reluctant to disqualify administrative adjudicators or to set aside their decisions on grounds of bias (1) merely because the administrative adjudicator participated in a matter in a non-adjudicative capacity, (2) merely because the administrative adjudicator held views on particular issues of law or public policy, or (3) merely because he or she developed or expressed opinions based on experience.³² It will be noted later that there has also been some reluctance to apply the strict standards contained in the ABA Code of Judicial Conduct to all administrative adjudicators.³³ The standards applied by judges in disqualifying administrative adjudicators have not been uniform, and have varied

²⁵ For example: "[A]gency adjudications are expected to be steeped in the complexities of their regulatory fields. They are expected to have acquired substantial experience with both the law in their area and the ranges of factual situations to which it applies." AMAN, *supra* note 8, § 8.1.

²⁶ See Gerald Ruth, *Unification of the Administrative Adjudicatory Process: An Emerging Framework to Increase "Judicialization" In Pennsylvania*, 5 WIDENER J. PUB. L.: 297 (1996).

²⁷ See KY. REV. STAT. ANN. § 13B.010 (8) (Michie 1996); KY. REV. STAT. ANN. § 15.111 (Michie 1996 & Supp. 2000).

²⁸ See Durant, *supra* note 6, at 9.

²⁹ "States with centralized administrative law judge or hearing officer divisions are in the minority; various states simply have hearing officers associated with each agency. Kentucky has followed a middle ground in which there are clusters of hearing officers." Durant, *supra* note 6, at 9 [citations omitted].

³⁰ See Durant, *supra* note 6, at 9.

³¹ *Id.* This suggests that there is at least a preference for lawyer hearing officers. See *infra* Part IV.A.

³² Part of the reluctance to disqualify may arise from the fact that administrative adjudicators may be difficult to replace because of limited staffing and the need for specific expertise. In some contexts the reluctance may be based on the fact that the adjudicator will be a part-timer who makes his living from other work in the community and who could not or would not serve if every "connection" to the agency or to outside pursuits could be deemed disqualifying. See FLAMM, *supra* note 9, § 30.1, at 928. See also the limits on a hearing officer's practice of law, *infra* note 92 and accompanying text.

³³ See discussion *infra* Part I.D.

from a demand that the moving party prove actual bias,³⁴ to a requirement of proof that the risk of actual bias is great, to a showing of "appearance of bias."³⁵

In Kentucky, in administrative proceedings not exempted from the provisions of Chapter 13B,³⁶ one of the grounds for disqualification of a hearing officer is that the hearing officer has "a personal bias toward any party to a proceeding which would cause a prejudgment on the outcome of the proceeding."³⁷ Fortunately, this general statement is supplemented by other statutory grounds.³⁸

C. Statutory Grounds for Disqualification

It was noted previously that the courts have allowed functions to be combined in an agency so long as an "internal" separation of functions is maintained.³⁹ Along these lines, KRS 13B.040 [Qualifications of hearing officer] provides in pertinent part:

(1) A person who has served as an investigator or prosecutor in an administrative hearing or in its preadjudicative stage shall not serve as hearing officer or assist or advise a hearing officer in the same proceeding. This shall not be construed as preventing a person who has participated as a hearing officer in a determination of probable cause or other equivalent preliminary determination from serving as a hearing officer in the same proceeding.⁴⁰

It should be noted that this Kentucky law, like its federal counterpart,⁴¹ is stricter than the standard applied in the constitutional "due process" cases.⁴²

³⁴ See, e.g., *AMAN*, *supra* note 8, § 8.5.6. In rulemaking proceedings, a standard of "clear and convincing showing" is required to prove bias. See *id.* (citing *Association of National Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1168-69 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980)).

³⁵ See, e.g., *AMAN*, *supra* note 8, § 8.5.6. (stating "This standard [Cinderella] takes both actual fairness as well as the appearance of propriety into account.") (citing *Cinderella Career & Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 853 (D.C. Cir. 1970)).

³⁶ For exemptions, see KY. REV. STAT. ANN. § 13B.020 (Michie 1996 & Supp. 2000).

³⁷ KY. REV. STAT. ANN. § 13B.040 (b) (4) (Michie 1996 & Supp. 2000).

³⁸ See generally "Qualifications of Hearing Officer," KY. REV. STAT. ANN. § 13B.040 (Michie 1996 & Supp. 2000).

³⁹ See *supra* note 19 and accompanying text.

⁴⁰ KY. REV. STAT. ANN. § 13B.040 (1) (Michie 1996 & Supp. 2000).

⁴¹ 5 U.S.C. § 554(d) provides in pertinent part:

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review ... except as witness or counsel in public proceedings. This subsection does not apply ... (C) to the agency or a member or members of the body comprising the agency.

Id.

⁴² See *Withrow v. Larkin*, 421 U.S. 35, 58 (1975) (holding that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation ..."). See also CHARLES KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 6.11 (2d ed. 1997) [hereinafter KOCH].

Other grounds of disqualification, and the procedures for disqualification, are set forth in KRS 13B.040 as follows:

(2)(a) A hearing officer, agency head, or member of an agency head who is serving as a hearing officer shall voluntarily disqualify himself and withdraw from any case in which he cannot afford a fair and impartial hearing or consideration. Any party may request the disqualification of a hearing officer, agency head, or member of the agency head by filing an affidavit, upon discovery of facts establishing grounds for a disqualification, stating the particular grounds upon which he claims that a fair and impartial hearing cannot be accorded. A request for the disqualification of a hearing officer shall be answered by the agency head within sixty (60) days of its filing. The request for disqualification and the disposition of the request shall be part of the official record of the proceeding. Requests for disqualification of a hearing officer shall be determined by the agency head. Requests for disqualification of a hearing officer who is a member of the agency head shall be determined by the majority of the remaining members of the agency head.

(b) Grounds for disqualification of a hearing officer shall include, but shall not be limited, to the following:

1. Serving as an investigator or prosecutor in the proceeding or the pre-adjudicative stages of the proceeding;
2. Participating in an *ex parte* communication which would prejudice the proceedings;
3. Having a pecuniary interest in the outcome of the proceeding; or
4. Having a personal bias toward any party to a proceeding which would cause a prejudgment on the outcome of the proceeding.⁴³

By the terms of the statute, these grounds are not exclusive, but there is little supplemental Kentucky caselaw. Presumably the practitioner could turn to secondary authority including the Code of Judicial Conduct,⁴⁴ federal caselaw, and the law of sister states. What is, or is not, personal bias? What relational interests might provide a basis for disqualification? What is the standard under §

⁴³ KY. REV. STAT. ANN. § 13B.040 (2) (a), (b) (Michie Supp. 2000).

⁴⁴ See MODEL CODE OF JUDICIAL CONDUCT (1990). See also *infra* notes 86-91 and accompanying text.

2(a) and § (b)4? It does not look like an "appearance of impropriety" standard.⁴⁵ Will that do, or does the movant have to provide concrete evidence of bias emanating from an extrajudicial source? Are there times when disqualification will be appropriate even though legally sufficient proof of actual bias has not been presented?⁴⁶

As noted previously, when functions are combined in an individual (as opposed to being combined in a single agency) the case for impropriety is strong.⁴⁷ Even in jurisdictions that do not apply the Code of Judicial Conduct to administrative adjudicators, the claim of impropriety will be particularly strong if the individual adjudicator can be shown to possess prior knowledge of the facts to be determined, or personally investigated or initiated the investigation, or has a pecuniary interest in the outcome.⁴⁸ Still, in the absence of the Code of Judicial Conduct, generalizations are hazardous. Courts being asked to disqualify an adjudicator may require a showing of "actual participation" in the case.⁴⁹ That is, a court may be reluctant to infer a basis for disqualification from an individual's title or from an organizational wiring diagram.⁵⁰

Along these lines, one question I was asked just before my talk at the training session was whether an administrative agency may employ an in-house hearing officer who is also the agency's general counsel or a regular prosecutor? Under KRS 13B.040(2)(a) or (b) does he or she have to have actually participated as an investigator or prosecutor *in the particular case*? Are we to assume or presume bias, or does actual bias have to be established? Who bears the burden of proof on that? There is some language in the famous case *Wong Yang Sung v. McGrath*,⁵¹ suggesting that it is unrealistic to expect a prosecutor to be able to investigate and prosecute "like cases" one day, and then put on his hearing officer cap and fairly judge "like cases" the next day, and so on.⁵² This argument has some common sense appeal. But subsequent cases do not exactly take an expansive view of the need for disqualification under the APA. For example, in *Au Yi Lau v. United States Immigration and Naturalization Service*,⁵³ it was held that the Chairman of the Board of Immigration Appeals did not participate improperly in the decision of a deportation matter although he was formerly employed as an attorney in the office of the INS General Counsel, although the General Counsel had supervisory responsibility over both the trial attorney who "prosecuted" the proceeding and the appellate counsel who presented to the Board the opposition of the INS to the petitioners' motions to reopen.⁵⁴ The court reasoned that under §554(d) of the APA "investigative and

⁴⁵ Compare KY. CODE OF JUDICIAL CONDUCT Canon 2, SUP. CT. R. 4.300, KY. R. ANN. Vol. 2. (Michie Supp. 2001) (alluding to an "appearance of impropriety" standard). See also Leslie Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55 (2000).

⁴⁶ Compare KY. CODE OF JUDICIAL CONDUCT Canon 3E (1), SUP. CT. R. 4.300, KY. R. ANN. Vol. 2. (Michie Supp. 2001) ("judge's impartiality might reasonably be questioned").

⁴⁷ See FLAMM, *supra* note 9, § 30.84, at 962-63.

⁴⁸ *Id.* at 963.

⁴⁹ *Id.*

⁵⁰ See generally *id.* at 963.

⁵¹ 339 U.S. 33 (1950).

⁵² *Id.* at 45.

⁵³ 555 F.2d 1036 (1977).

⁵⁴ See *id.* at 1042-43.

prosecuting personnel are precluded only from participating in the adjudication of cases in which they have actually performed such functions, and in 'factually related' cases."⁵⁵ Unless he had actually personally supervised the INS attorneys who argued against the petitioners in the case, or had knowledge or familiarity with this or any other case arising out of the same transaction, he was not disqualified or participating improperly.⁵⁶

Then there are procedural questions. The party seeking disqualification must seek it in a timely manner, "upon discovery of facts establishing grounds."⁵⁷ The quoted words should be read to mean "as soon as practicable after a party has reasonable cause to believe that such [grounds] exist."⁵⁸ Failure to make a timely motion will presumably be treated as a waiver.⁵⁹ Presumably an appeal of a decision not to disqualify will have to await a final administrative adjudication.⁶⁰ On appeal, one assumes that it must be shown that there was an abuse of discretion in deciding the motion.⁶¹

D. Code of Judicial Conduct

Ever since the rise of administrative law in the 1930s there have been efforts to "judicialize the process."⁶² It has already been noted that dissatisfaction with the combination of adjudicatory and prosecutorial functions in many agencies led to a greater separation for federal administrative law judges (ALJs) under the federal Administrative Procedure Act (APA).⁶³ The APA ushered in the modern administrative hearing, which incorporated the essential elements of the judicial model.⁶⁴ That federal ALJs are perceived to be comparable to trial judges was recognized by the Supreme Court in *Butz v. Economou*.⁶⁵ To the extent that the administrative law official is performing in a judicial or quasi-judicial role, should the Code of Judicial Conduct apply?⁶⁶

Originally, the answer seemed to be "no," because administrative officials are operating under the authority of the executive, and therefore they are not judicial officers.⁶⁷ Furthermore, their decisions are recommendations which

⁵⁵ *Id.* at 1043.

⁵⁶ *Id.*

⁵⁷ See FLAMM, *supra* note 9, § 30.7, at 956 (citing 5 U.S.C. § 556 (b) (1982)).

⁵⁸ See FLAMM, *supra* note 9, § 30.7, at 956.

⁵⁹ See FLAMM, *supra* note 9, § 30.72, at 956; *cf.* KY. REV. STAT. ANN. § 13B.020 (6) (Michie 1996 & Supp. 2000); *Gibson v. F.T.C.*, 682 F.2d 554 (1982), *reh'g granted*, 688 F.2d 840 (5th Cir. 1982) (waiver under the federal APA).

⁶⁰ See FLAMM, *supra* note 9, § 30.7, at 956.

⁶¹ See FLAMM, *supra* note 9, § 30.10.2, at 965.

⁶² See AMAN, *supra* note 8, § 8.5.1, at 239-42.

⁶³ See AMAN, *supra* note 8, § 8.5.2, at 242.

⁶⁴ See generally AMAN, *supra* note 8, § 8.5.2, at 243.

⁶⁵ 438 U.S. 478, 513 (1978).

⁶⁶ Once again, since investigative and adjudicative responsibilities are frequently combined in a single agency in the administrative context (though not in a judicial context, where the Code of Judicial Conduct applies), it may be permissible for one who possesses personal knowledge of disputed evidentiary facts to sit in judgment. At least, this is so as a matter of constitutional due process. See *Withrow v. Larkin*, 421 U.S. 35 (1975).

⁶⁷ See Karen Lewis, *Administrative Law Judges and The Code Of Judicial Conduct: A Need For Regulated Ethics*, 94 DICK. L. REV. 929, 938, 947 (1990) [hereinafter Lewis].

can be overturned by agency higher ups.⁶⁸ So in some jurisdictions, efforts to apply the Code of Judicial Conduct directly were rejected.⁶⁹ Other states applied the Code of Judicial Conduct by analogy, at least in some contexts.⁷⁰ Perhaps sensing a need to foster public credibility in the administrative process, the ABA Standing Committee on Ethics and Professional Responsibility offered a proposed (1989-90) revision of the Code of Judicial Conduct containing the following footnote:

Applicability of this Code to administrative law judges should be determined by each adopting jurisdiction. Administrative law judges generally are affiliated with the executive branch of government rather than the judicial branch and each adopting jurisdiction should consider the unique characteristics of particular administrative law judge positions in adopting and adapting the Code for administrative law judges.

This footnote is consistent with the views expressed in an earlier ABA opinion⁷¹ which noted that the applicability of the Code to the state administrative law process depends on all the facts and circumstances.⁷² State bar ethics opinions (and judicial ethics opinions) are consistent with this to the extent that they are "all over the boards."⁷³

In the past the Ethics Committee of the Kentucky Judiciary⁷⁴ has taken the position that a lawyer serving as a hearing officer for an administrative body would not be serving as an officer of the judicial branch of government and would not be subject to the Code of Judicial Conduct.⁷⁵ Following this logic, the Ethics Committee of the Kentucky Judiciary declined to issue an ethics opinion in response to a request from a hearing examiner for a city's human rights commission and referred the lawyer/examiner's question to the Kentucky Bar Association Ethics Committee.⁷⁶ Our high court could apply the Code of Judicial Conduct by analogy when reviewing agency decisions,⁷⁷ or leave it to the legislature or agency decision makers to either adopt or reject the Code of Judicial Conduct⁷⁸ or develop similar rules consistent with powers granted by

⁶⁸ See *id.* at 947.

⁶⁹ See generally Levinson, *supra* note 3, at 256. See also Lewis, *supra* note 66, at 954.

⁷⁰ See Lewis, *supra* note 67, at 936.

⁷¹ See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1522 (1986).

⁷² ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1522 (1986) (holding that federal ALJs are "judges" and are covered by the Code of Judicial Conduct). See Levinson, *supra* note 3, at 255.

⁷³ See generally Judith Meierhenry, *The Due Process Right to an Unbiased Adjudicator in Administrative Proceedings*, 36 S.D. L. REV. 551 (1991). See also Lewis, *supra* note 67.

⁷⁴ Kentucky's Supreme Court Rules authorize an Ethics Committee of the Kentucky Judiciary to render formal and informal advisory opinions. See SUP. CT. R. 4.310, KY. R. ANN. Vol. 2. (Michie Supp. 2001).

⁷⁵ See Ky. Bar Ass'n Ethics Committee Op. E-402 (1997).

⁷⁶ See Ky. Bar Ass'n Ethics Committee Op. E-398 (1997). All of the Kentucky Ethics, Judicial Ethics, and Unauthorized Practice opinions cited in this article are collected in full text in KENTUCKY LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY DESKBOOK (Todd Eberle and Richard Underwood, eds., 2d ed. 1999).

⁷⁷ See Levinson, *supra* note 3, at 226.

⁷⁸ *Id.* at 230.

enabling statutes.⁷⁹ The chief ALJ or hearing officer in a central panel or cluster might have the authority to adopt the Code of Judicial Conduct in whole or in part.⁸⁰ It seems unlikely that the Court would attempt to impose the Code of Judicial Conduct directly on any administrative body because of the concept of separation of powers or because of considerations of comity.⁸¹

In Kentucky, some administrative adjudicators are calling for the direct application of the Code of Judicial Conduct, or a derivative of the Code, to at least some types of hearing officers. I attach a copy of a non-final draft of a "Proposed Code of Judicial Conduct for Hearing Officers" developed by the Ethics Committee of the Kentucky Association of Administrative Adjudicators.⁸² These rules were based in part on the Kentucky Code of Judicial Conduct,⁸³ the ABA-NALJ Model Canons, and the Canons of the National Association of Administrative Law Judges.⁸⁴

I think that the adoption of such a proposed Code - at least Canons 1 through 3, would be a positive development, at least in the context of Chapter 13B proceedings. Does the Code add anything that is not already present in KRS 13B.040⁸⁵ [Qualifications of hearing officer]? The answer is clearly - "Yes."

Consider all of the questions I raised but did not answer, with respect to KRS 13B.040 regarding personal bias, personal knowledge of facts, relational interests, and so forth. The "Proposed Code of Judicial Conduct for Hearing Officers," would provide some answers to these questions.⁸⁶ It provides for disqualification when the hearing officer's impartiality might reasonably be questioned⁸⁷ in instances when: (1) the hearing officer has personal bias or prejudice or personal knowledge of disputed evidentiary facts;⁸⁸ (2) the hearing officer served as a lawyer or representative in the matter in controversy;⁸⁹ (3) the

⁷⁹ *Id.*

⁸⁰ *Id.* at 235.

⁸¹ *Id.* at 229 (discussing state and federal constitutional limitations on judicial and legislative powers).

⁸² See Appendix.

⁸³ See KY. CODE OF JUDICIAL CONDUCT, SUP. CT. R. 4.300, KY. R. ANN. Vol. 2. (Michie Supp. 2001).

⁸⁴ MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES, available at <<http://www.nalj.com/my%20site/mcjcsalj.htm>>.

⁸⁵ See KY. REV. STAT. ANN. § 13B.040 (Michie 1996 & Supp. 2000).

⁸⁶ See Appendix.

⁸⁷ See CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS § 3 E (1) (Ky. Ass'n of Admin. Adjudicators, Proposed 2001), reprinted in Appendix; cf. KENTUCKY CODE OF JUDICIAL CONDUCT, SUP. CT. R. 4.300, Canon 3 E (1), KY. RULES ANN. Vol. 2 (Michie 2001) (stating: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . .").

⁸⁸ See CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS § 3 E (1) (a) (Ky. Ass'n of Admin. Adjudicators, Proposed 2001), reprinted in Appendix; cf. KENTUCKY CODE OF JUDICIAL CONDUCT, SUP. CT. R. 4.300, Canon 3 E (1) (a), KY. RULES ANN. Vol. 2 (Michie 2001) (stating: "[A judge shall disqualify himself if the] judge has . . . a personal bias or prejudice . . . or personal knowledge of disputed evidentiary facts concerning the proceeding."). See also MODEL CODE OF ETHICS § III (Nat'l Ass'n of Hearing Officers), available at <http://www.naho.org/code_of_ethics.htm> (stating: "Personal knowledge of the facts in a case is an appropriate ground for disqualification of the hearing official.").

⁸⁹ See CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS § 3 E (1) (b) (Ky. Ass'n of Admin. Adjudicators, Proposed 2001), reprinted in Appendix; cf. KENTUCKY CODE OF JUDICIAL CONDUCT, SUP. CT. R. 4.300, Canon 3 E (1) (b), KY. RULES ANN. Vol. 2 (Michie 2001) (stating: "[A judge

hearing officer or a close relative has an interest in the subject matter or controversy;⁹⁰ or, (4) the hearing officer or a close relative is a party to the proceeding or appears as a lawyer in the proceeding.⁹¹ Given the lack of uniformity in the case law, it would be helpful if we adopted some clear rules like those contained in Canon 3, so that we could avoid litigating all of these issues on a subjective and *ad hoc* basis.

Still, some amendments and deletions to the Proposed Code may be advisable. Is the definition of "hearing officer" too broad? There are hearing officers and then there are hearing officers. Some are exempt from KRS 13B.⁹² I do not think that it is necessary or appropriate to apply the standards of the Code of Judicial Conduct to all administrative adjudicators. However, that may not be the intent of the drafters of the Code. Perhaps this is a Code only for KRS 13B hearing officers. One also wonders how you deal with agency heads and other officials who have special and multiple roles.⁹³ Of course, this is a voluntary code at this point. The individual agencies will presumably have something to say about its applicability.

I also wonder about the need for and practicality of Canons 4 and 5 in the administrative context.⁹⁴ I note that the Model Code of Ethics of the National Association of Hearing Officials does not attempt to incorporate the elaborate

shall disqualify himself if the] judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter . . .").

⁹⁰ See CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS § 3 E (1) (c) (Ky. Ass'n of Admin. Adjudicators, Proposed 2001), *reprinted in* Appendix; *cf.* KENTUCKY CODE OF JUDICIAL CONDUCT, SUP. CT. R. 4.300, Canon 3 E (1) (c), KY. RULES ANN. Vol. 2 (Michie 2001) (stating: "[A judge shall disqualify himself if the] judge . . . or the judge's [close relative] has . . . more than a de minimis interest . . . that could be substantially affected by the proceeding.").

⁹¹ See CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS § 3 E (1) (d) (Ky. Ass'n of Admin. Adjudicators, Proposed 2001), *reprinted in* Appendix; *cf.* KENTUCKY CODE OF JUDICIAL CONDUCT, SUP. CT. R. 4.300, Canon 3 E (1) (d), KY. RULES ANN. Vol. 2 (Michie 2001) (for disqualification when the judge's spouse or other close relative is a witness, a lawyer in the proceeding and so on). See also Ky. Judicial Ethics Op. JE-1 (finding disqualification when judge's son appearing as a lawyer); Ky. Judicial Ethics Op. JE-8 (finding disqualification when judge's son is assistant Commonwealth attorney); Ky. Judicial Ethics Op. JE-69 (finding disqualification when judge's ex-wife is a witness). According to the Comments to the Code of Judicial Conduct, a judge is not necessarily disqualified just because a lawyer appearing before him is associated in practice with the judge's lawyer-relative. See MODEL CODE OF JUDICIAL CONDUCT Canon 3 E (1) commentary (1990).

⁹² See KY. REV. STAT. ANN. § 13B.020 (Michie 1996 & Supp. 2000).

⁹³ *Cf.* Administrative Procedure Act, 5 U.S.C. § 554 (d) (2) (C), *supra* note 41.

⁹⁴ Compare MODEL CODE OF JUDICIAL CONDUCT Canon 4 (1990) (dealing with a judge's extra-judicial activities) and MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1990) (dealing with a judge's political activities) with CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS Canons 4 and 5 (Ky. Ass'n of Admin. Adjudicators, Proposed 2001), *reprinted in* Appendix. See also CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS § 4 G (Ky. Ass'n of Admin. Adjudicators, Proposed 2001) (describing the limits on the hearing officer's ability to practice law), *reprinted in* Appendix. None of these canons seem terribly restrictive, and yet § 4 G (3) may be more restrictive than some of the current ethics opinions. Compare CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS § 4 G (3) (Ky. Ass'n of Admin. Adjudicators, Proposed 2001) (stating: "The hearing officer shall not practice law before the administrative body for which the hearing officer serves as hearing officer."), *reprinted in* Appendix, with Ky Bar Ass'n Ethics Committee Op. E-398 (1997) (stating that a lawyer in private practice may serve as a hearing officer for her local Human Rights Commission, and also practice before the Commission).

provisions of the Code of Judicial Conduct relating to civic, political, and business activities.⁹⁵

E. Ex Parte Communications

The question of *ex parte* communications seems to come up frequently. Apparently some have been so bold as to suggest that "*ex parte* contacts in Kentucky are, or should be, the 'bread and butter' of administrative proceedings to be tolerated with a knowing wink."⁹⁶ However, this cynical proposition was rejected with considerable judicial indignation in *Louisville Gas and Electric Company v. Commonwealth*.⁹⁷

The right to a fair hearing includes the notion that one has to have a reasonable opportunity to know the claims and contentions of the opposing party and to meet them.⁹⁸ Therefore, we have the fundamental rule regarding the "exclusivity of the record."⁹⁹ The administrative tribunal should take nothing into consideration that has not been introduced in the record.¹⁰⁰ The rule that the administrative adjudicator should not communicate *ex parte* with any party or its representatives concerning the merits, except upon notice to all parties, is a corollary to all of this.¹⁰¹ *Ex parte* communications can lead to the disqualification of the administrative decision maker,¹⁰² and may, in some circumstances, result in a reversal of a decision rendered by an administrative tribunal.¹⁰³ But administrative adjudicators are frequently exposed to unsolicited

⁹⁵ See MODEL CODE OF ETHICS (Nat'l Ass'n of Hearing Officers), available at <http://www.naho.org/code_of_ethics.htm>.

⁹⁶ *Louisville Gas & Elec. Co. v. Commonwealth*, 862 S.W.2d 897, 901 (Ky. Ct. App. 1993).

⁹⁷ See *id.*

⁹⁸ See FLAMM, *supra* note 9, § 30.5.7.1, at 949.

⁹⁹ See AMAN, *supra* note 8, § 8.5.3.

¹⁰⁰ See FLAMM, *supra* note 9, § 30.5.7.1, at 949.

¹⁰¹ See Ky. Bar Ass'n Ethics Committee Op. E-402 (1997), reprinted in Richard Underwood, *Advisory Ethics Opinions*, KY. BENCH & BAR 52, 56, 58-59 (Spring 1997). For good general references regarding the rules governing *ex parte* communications and the procedures followed when one must deal with violations of the rules, see FLAMM, *supra* note 9, § 30.5.7. See also Leslie Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUS. L. REV. 1343 (2000); Cornelius Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies*, 76 HARV. L. REV. 233 (1962); Note, *Ex Parte Contacts Under the Constitution and Administrative Procedure Act*, 80 COLUM. L. REV. 379 (1980). See also National Association of Hearing Officers Model Code of Ethics:

Ex Parte Communication: 1. Hearing officials should have a strong working knowledge of their jurisdiction's definitions and restrictions on *ex parte* contact. Generally, "*ex parte*" refers to communication between a hearing official and fewer than all parties to an administrative hearing. 2. Hearing officials should not receive information from any party without sharing that information with all parties

MODEL CODE OF ETHICS § V (Nat'l Ass'n of Hearing Officers), available at <http://www.naho.org/code_of_ethics.htm>.

¹⁰² See KY. REV. STAT. ANN. § 13B.040 (2) (b) (2) (Michie Supp. 2000).

¹⁰³ See *Louisville Gas and Elec. Co. v. Commonwealth*, 862 S.W.2d 897, 900 (Ky. Ct. App. 1993) (*ex parte* contacts make administrative agencies' decisions voidable); cf. *Nat'l-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 515 (Ky. Ct. App. 1990) (finding no reversible error where *ex parte* contacts were with each party for purposes of mediation and fact-finding).

ex parte communications, and not every such contact should be disqualifying.¹⁰⁴ Ordinarily, reversible error will only be found where the complaining party has been materially prejudiced.¹⁰⁵ On the other hand, Flamm contends that it is appropriate to place the burden of demonstrating that a prohibited communication was *not* prejudicial on the challenged administrator.¹⁰⁶

KRS 13B.100[Prohibited communications], which prohibits *ex parte* communications, provides:

(1) Unless required for the disposition of *ex parte* matters specifically authorized by statute, a hearing officer shall not communicate off the record with any party to the hearing or any other person who has a direct or indirect interest in the outcome of the hearing, concerning any substantive issue, while the proceeding is pending.

(2) The prohibition stated in subsection (1) shall not apply to:

(a) Communication with other agency staff, if the communication is not an *ex parte* communication received by staff; and

(b) Communication among members of a collegial body or panel which by law is serving as a hearing officer.

(3) If an *ex parte* communication occurs, the hearing officer shall note the occurrence for the record, and he shall place in the record a copy of the communication, if it was written, or a memorandum of the substance of the communication, if it was oral.¹⁰⁷

All of this may seem simple and familiar to the practitioner. On the other hand, it has been suggested that the definition of prohibited *ex parte* contact under the Kentucky caselaw may be broader than that contained in either the federal APA or KRS 13B - the warning being "if there is any doubt, the matter should be treated as a prohibited *ex parte* contact."¹⁰⁸

As Chairman of the KBA Ethics Committee, and as a Professor of Law, I have encountered a problem with judges who call experts to obtain assistance without notifying all parties in the matter. This may get judges and administrative adjudicators in trouble. The Kentucky Code of Judicial Conduct

¹⁰⁴ See FLAMM, *supra* note 9, § 30.5.7.3, at 952.

¹⁰⁵ See *id.*

¹⁰⁶ See FLAMM, *supra* note 9 § 30.5.7.3, at 952. On the other hand, we do not ordinarily require a person or party to prove a negative.

¹⁰⁷ KY. REV. STAT. ANN. § 13B.100 (Michie 1996). The federal APA contains similar prohibitions at 5 U.S.C. §557(d)(1). See AMAN, *supra* note 8, § 8.5.3 and text accompanying note 8.

¹⁰⁸ KENTUCKY ADMINISTRATIVE LAW, *supra* note 6, §§ 6.30-6.31 (citing Louisville Gas and Elec. Co. v. Commonwealth, 862 S.W.2d 897, 900-01 (Ky. Ct. App. 1993)).

provides that "a judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge."¹⁰⁹ However, the ABA versions of the Code of Judicial Conduct require that the judge give "notice to the parties of the person consulted and the substance of the advice, and afford . . . the parties reasonable opportunity to respond."¹¹⁰ I have always declined to opine unless the ABA procedures are followed. Certainly, there should be no *ex parte* contacts with experts regarding factual matters or matters that are not purely questions of law.¹¹¹

Just prior to my presentation¹¹² I was asked a question that seems to be related to the problem of *ex parte* communication or institutional bias or both. Specifically, I was asked whether the executive director of an administrative agency may participate, or even be present, during the "Board's" consideration of a disciplinary matter while in executive session. What are the risks here - combination of functions and bias, or *ex parte* communications, or both?¹¹³ If the person is not a member of the body or panel that is serving as the hearing officer, what is he or she doing there, and are comments that he or she might make prohibited by KRS 13B.100?¹¹⁴ Is this just a way for an "interested party" to influence the decision maker? Certainly there is an appearance of impropriety.¹¹⁵ Perhaps I am missing something, but the scenario does not pass my "smell test." When I made similar comments at the training session,¹¹⁶ I received no response from the audience, but mine may not be the last word on this practice.

F. Confidentiality

¹⁰⁹ KENTUCKY CODE OF JUDICIAL CONDUCT, SUP. CT. R. 4.300, Canon 3 B (7) (b), KY. RULES ANN. Vol. 2 (Michie 2001).

¹¹⁰ MODEL CODE OF JUDICIAL CONDUCT Canon 3 B (7) (b) (1990). It is not clear why the Kentucky version does not explicitly mention these procedures. Perhaps the draftspersons were of the opinion that the judge should be able to get the "law," as opposed to other forms of expertise wherever he or she can find it, without notice to the parties. But as Professor Abramson points out, the Kentucky version of the Code of Judicial Conduct deprives the parties of any opportunity to cross-examine the expert in order to bring out the expert's biases or prejudices. See Leslie Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUS. L. REV. 1343, 1372-73, n.112 (2000).

¹¹¹ See National Association of Hearing Officers Model Code of Ethics: "If hearing officials are authorized to consult with an expert, the nature of the consultation and the substance of the expert's advice must be disclosed to all parties. Hearing officials should also give all parties an opportunity to respond." MODEL CODE OF ETHICS § V (3) (Nat'l Ass'n of Hearing Officers), available at <http://www.naho.org/code_of_ethics.htm>.

¹¹² See Underwood, *supra* note 2.

¹¹³ See AMAN, *supra* note 8, § 8.5.4, at 248.

¹¹⁴ See KY. REV. STAT. ANN. § 13B.100 (Michie 1996).

¹¹⁵ See *Louisville Gas and Elec. Co. v. Commonwealth*, 862 S.W.2d 897, 900 (Ky. Ct. App. 1993) (expressing at least some concern with "protecting the integrity of the administrative process, which includes the question of the appearance of impropriety . . ."); cf. National Association of Hearing Officers Model Code of Ethics: "[S]upervisors may provide consultation to hearing officials, except as prohibited by law, but may not alter the hearing officials' decisions or substitute their judgment for that of the hearing officials." MODEL CODE OF ETHICS § IV (Nat'l Ass'n of Hearing Officers), available at <http://www.naho.org/code_of_ethics.htm>. See also Section V(2), Ex Parte Communication: "Hearing officials should not receive information from any party without sharing that information with all parties."

¹¹⁶ See Underwood, *supra* note 2.

It might be helpful if any Proposed Code for Hearing Officers also addressed the issue of confidentiality. For example, Kentucky Rule of Professional Conduct (KRPC) 1.11(b) and (c) recognize that a lawyer serving as a public officer or employee may acquire "confidential government information" - information about a person, obtained under government authority - which ought not be disclosed.¹¹⁷ In this regard, the National Association of Hearing Officers Model Code, Section IX contains the following useful language:

Confidentiality

1. Hearing officials should not disclose confidential or private information obtained by reason of official position or authority except as required by law.
2. Hearing officials should never seek to use such confidential information to further their personal interests
4. Hearing officials should avoid ex parte communications with anyone (including family, friends, and agency staff and associates) unless authorized by statute or agency regulations. However, hearing officials may in confidence discuss cases with other hearing officials.¹¹⁸

G. The Revolving Door - Negotiating for Private Employment

Most practitioners are familiar with the problem of the "revolving door."¹¹⁹ Lawyers in Washington, and to a lesser extent in Frankfort, go in and out of government service in administrative agencies, lobbying or appearing before their former agencies. Conflicts of interest and other abuses associated with the revolving door are addressed in Kentucky Rules of Professional Conduct 1.11 [Successive government and private employment].¹²⁰ To the extent that a lawyer working for an agency is also an adjudicator, the lawyer should also consider KRPC 1.12, which deals with the conflicts of former judges and arbitrators.¹²¹ Perhaps the most overlooked provision of the latter is KRPC 1.12(b), which provides that a lawyer serving as a judge or arbitrator shall not negotiate for private employment with any party or attorney for a party appearing before him in a matter. I do not know whether this scenario has presented any

¹¹⁷ See KY. RULES OF PROFESSIONAL CONDUCT Rule 1.11 (b), (c), SUP. CT. R. 3.130, KY. RULES ANN. Vol. 2 (Michie 2001).

¹¹⁸ MODEL CODE OF ETHICS § IX (Nat'l Ass'n of Hearing Officers), *available at* <http://www.naho.org/code_of_ethics.htm>.

¹¹⁹ See generally KOCH, *supra* note 42, § 6.20 (2), at 340-42; § 6.22 (3) (e), at 348-49.

¹²⁰ See KY. RULES OF PROFESSIONAL CONDUCT Rule 1.11, SUP. CT. R. 3.130, KY. RULES ANN. Vol. 2 (Michie 2001).

¹²¹ See KY. RULES OF PROFESSIONAL CONDUCT Rule 1.12, SUP. CT. R. 3.130, KY. RULES ANN. Vol. 2 (Michie 2001).

problems for Kentucky ALJ's or hearing officers. However, I am reminded of a case in Kentucky in which a confident lawyer waited a very long time for findings of fact and conclusions of law in a case that he was sure he was going to win. When he finally received them he was shocked at the outcome, and even more shocked to discover that the judge had resigned the next day after issuing them to take a job with the winning firm. I do not know if there was any fallout from this peculiar set of "circumstances."

III. THE ETHICS OF THE REPRESENTATIVE

A. The ABA Model Code and Model Rules

The provisions of the Model Code of Professional Responsibility apply to lawyers appearing before administrative agencies in adjudicatory proceedings.¹²² The definitions section of the Model Code defines "tribunal" as including "all courts and all other adjudicatory bodies."¹²³ Furthermore, EC 7-15 provides that "[w]here the applicable rules of the agency impose specific obligations upon a lawyer, it is his duty to comply therewith, unless the lawyer has a legitimate basis for challenging the validity thereof."¹²⁴ Prior to the adoption of the Kentucky Rules of Professional Conduct, Kentucky lawyers were disciplined under the Code for misconduct in administrative proceedings.¹²⁵

Now Kentucky has a version of the Model Rules.¹²⁶ The Rules apply to lawyers appearing before administrative agencies, although it takes some effort to find the controlling language.¹²⁷ Unfortunately, the definitions section of the Rules does not include a definition of "tribunal."¹²⁸ However, Rule 3.9 provides that a lawyer appearing as an advocate "before a legislative or administrative tribunal in a *nonadjudicative* proceeding" must still follow "the provisions of Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5."¹²⁹ So it would seem to follow that a lawyer appearing as an advocate in an adjudicative, trial-type, administrative proceeding would have all of the obligations under the Rules as a lawyer appearing before a court.¹³⁰ EC 7-15 is restated in Model Rule 3.4(c): "A lawyer shall not: (c) knowingly disobey an obligation under the rules of a

¹²² See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1981).

¹²³ MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (6) (1981).

¹²⁴ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-15 (1981).

¹²⁵ See, e.g., Ky. Bar Ass'n v. Nall, 599 S.W.2d 899 (Ky. 1980) (a referral to disciplinary authorities led to discipline).

¹²⁶ The Kentucky Rules of Professional conduct became effective January 1, 1990. See KENTUCKY RULES OF PROFESSIONAL CONDUCT, SUP. CT. R. 3.130, KY. RULES ANN. Vol. 2 (Michie 2001).

¹²⁷ See e.g., KENTUCKY RULES OF PROFESSIONAL CONDUCT Rule 1.11 cmt. 2, SUP. CT. R. 3.130, KY. RULES ANN. Vol. 2 (Michie 2001) ("A lawyer representing a government agency . . . is subject to the Rules of Professional Conduct . . .").

¹²⁸ See KENTUCKY RULES OF PROFESSIONAL CONDUCT, SUP. CT. R. 3.130, KY. RULES ANN. Vol. 2 (Michie 2001).

¹²⁹ KENTUCKY RULES OF PROFESSIONAL CONDUCT Rule 3.9, SUP. CT. R. 3.130, KY. RULES ANN. Vol. 2 (Michie 2001) (emphasis added).

¹³⁰ See Levinson, *supra* note 3, at 226.

tribunal except for an open refusal based on an assertion that no valid obligation exist. . ."¹³¹ For its part, the Restatement of Law Governing Lawyers (Third) provides in pertinent part:

A lawyer representing a client before a legislative or administrative agency . . . (2) must comply with applicable law and regulations governing such representations; and (3) except as applicable law otherwise provides: (a) in an adjudicative proceeding before a government agency or involving an agency as a participant, has the legal rights and responsibilities of an advocate in a proceeding before a judicial tribunal¹³²

In summary, the Kentucky Rules of Professional Conduct apply to lawyers practicing before state administrative agencies in adjudicative proceedings, and the rules of the agency may also impose additional standards or obligations to the tribunal through Rule 3.4(c).¹³³

One controversial issue in federal administrative practice has to do with the power of a federal agency to hold a lawyer to regulatory duties that appear to conflict with the ethics rules, for example, Rule 1.6 (Confidentiality of Information).¹³⁴ As we shall see below, the power of a Kentucky agency to impose additional obligations in conflict with the Kentucky Rules of Professional Conduct would be limited by the doctrine of separation of powers.¹³⁵

C. Enforcement

Before addressing the problem of enforcement of the Rules of Professional Conduct, I would like to point out some distinctions between the power to admit or "disbar" persons to practice before an agency, the power to discipline an advocate, and the power to exclude an advocate as a means of punishing misconduct or controlling the proceedings. This gets confusing because the rules are different in the state and federal systems. We also need to address the question of whether administrative adjudicators have the equivalent of the judicial contempt power.

Regarding admission of attorneys to practice, in Kentucky the license to practice law also admits the lawyer to practice before state administrative

¹³¹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (c) (2000).

¹³² RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 104 (2000).

¹³³ See KENTUCKY RULES OF PROFESSIONAL CONDUCT Rule 3.4 (c), SUP. CT. R. 3.130, KY. RULES ANN. Vol. 2 (Michie 2001).

¹³⁴ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2000). See also Nancy Combs, *Understanding Kay Scholar: The Autonomous Citizen, the Managed Subject and the Role of the Lawyer*, 82 CAL. L. REV. 663-716 (1993), cited in CHARLES KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 6.22 (1) (2d ed. 1997). I am not as confident as the author of this comment that federal agencies do not have some power here. If the agency is acting pursuant to its statutory authority, then it seems to me that the *federal law* trumps state ethics rules, notwithstanding the curious language of Comment [20] to Model Rule 1.6: "The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 20 (2000).

¹³⁵ See discussion *infra* part IV.C.

tribunals.¹³⁶ Under federal law, the lawyer's Kentucky license also automatically admits the lawyer to practice before federal agencies,¹³⁷ except for the Patent and Trademark Office which may impose its own standards for attorney admission.¹³⁸ Regarding admission of non-lawyers, Kentucky agencies have no power to admit laymen.¹³⁹ In marked contrast, federal agencies do have, and in fact exercise, the power to admit non-lawyers according to the agency's own admissions criteria.¹⁴⁰

Federal agencies may also have the statutory authority to suspend lawyers from practice before them.¹⁴¹ Technically speaking, a Kentucky administrative adjudicator has no power to suspend or "disbar" a lawyer.¹⁴² However, a hearing officer has the authority and duty to maintain order during the prehearing¹⁴³ and hearing¹⁴⁴ stages of the adjudication. While a hearing officer may not have the contempt power,¹⁴⁵ a hearing officer may exclude counsel for disruptive behavior,¹⁴⁶ may disqualify counsel for conflicts of

¹³⁶ See Levinson, *supra* note 3, at 221.

¹³⁷ See 5 U.S.C. § 500 (a) (2), (b) (1994).

¹³⁸ See 5 U.S.C. § 500 (e) (Supp. 1999).

¹³⁹ See *infra* text accompanying notes 167-68.

¹⁴⁰ See 5 U.S.C. § 500 (c) (1994) (providing for certified public accountant to represent a person before the Internal Revenue Service). See also 31 C.F.R. §§ 10.0-10.97 (2000) (describing regulation of practice before the Internal Revenue Service); Levinson, *supra* note 3, at 253.

¹⁴¹ See KOCH, *supra* note 41, § 6.23 (2). See also Levinson, *supra* note 3, at 247 (citing Polydoroff v. Interstate Commerce Comm'n, 773 F.2d 372 (D.C. Cir. 1985) (upholding power of the Interstate Commerce Commission to suspend two practitioners for six months for violation of the canons of ethics contained in the ICC's rules)); Jaskiewicz v. Mossinghoff, 822 F.2d 1053 (Fed. Cir. 1987) (upholding the Patent and Trademark Office's suspension of an attorney for filing misleading information and other "inequitable conduct").

¹⁴² Consider Ky. Bar Ass'n Ethics Committee Op. E-32 (1967), in which the Kentucky Bar Association Ethics Committee reasoned that a judge may dispose of unethical conduct through the contempt power, but that "[d]isciplinary actions relating to a reprimand, suspension, or disbarment rest solely and exclusively in the Court of Appeals [now the Supreme Court]." *Id.* (citing *In re Wehrman*, 327 S.W.2d 743 (Ky. 1959)). That much of the opinion makes sense. However, the Committee went on to opine that a judge of a "minor court" had no right to pass judgment on the ethical conduct of a member of the bar, except through contempt proceedings. That strikes me as a questionable proposition at best. Judges may take disciplinary actions against lawyers who practice before them, including reprimands, sanctions, and even exclusion, and may refer unethical conduct to the Bar Counsel. Compare KENTUCKY CODE OF JUDICIAL CONDUCT, SUP. CT. R. 4.300, Canon 3 D (1) - (3), KY. RULES ANN. Vol. 2 (Michie 2001) (providing that a judge who knows of substantial likelihood that a judge or attorney has violated applicable rules of the Kentucky Code of Judicial Conduct "should inform the appropriate authority.") with KENTUCKY CODE OF JUDICIAL CONDUCT, SUP. CT. R. 4.300, Comment to Cannon 3D, KY. RULES ANN. Vol. 2 (Michie 2001) (stating "appropriate action may include direct communication with the judge or lawyer . . ."). The quibble factor in KBA E-32 seems to be over what we mean when we use the word "discipline."

¹⁴³ See KY. REV. STAT. ANN. § 13B.070 (1) (Michie 1996 & Supp. 2000).

¹⁴⁴ See KY. REV. STAT. ANN. § 13B.080 (1) (Michie 1996).

¹⁴⁵ The power to punish for contempt is "inherent in every court." See *Underhill v. Murphy*, 78 S.W. 482, 484 (Ky. 1904). However, an administrative hearing officer is not, strictly speaking, a judicial officer. Some state and federal courts have concluded that the contempt power may only be exercised by a judicial court. See Levinson, *supra* note 3, at 247-48, collecting the conflicting precedents; cf. KY. REV. STAT. ANN. § 13B.080 (3) (Michie 1996) (stating that a subpoena from a hearing officer may be enforced by an application to the Circuit Court for an order for compliance; noncompliance with such an order may then be treated as a contempt of court). See also Levinson, *supra* note 3, at 239.

¹⁴⁶ See Levinson, *supra* note 3, at 242-44.

interest,¹⁴⁷ and may also treat noncompliance with orders and disruptive behavior as grounds for a default order, resulting in a grant or denial of relief.¹⁴⁸ Furthermore, the hearing officer can and should refer instances of unethical behavior to bar counsel.¹⁴⁹

It is assumed that most hearing officers would prefer to address misbehavior with warnings and referrals to the state bar. More serious and immediate action will require an adequate record. Furthermore, the Kentucky hearing officer has a limited number of options. Exclusion and default are drastic remedies. If counsel is excluded, the hearing officer may have to give the represented party a reasonable time to obtain substitute counsel.¹⁵⁰

IV. UNAUTHORIZED PRACTICE ISSUES

A. Lay ALJs and Hearing Officers

One of the questions I was asked to address at the training conference was whether hearing officers must be admitted to the bar. I assume that in most states, including Kentucky, the answer is no. Constitutional "due process" does not require ALJs or hearing officers to be admitted to the bar.¹⁵¹ That should not be surprising given the breadth of the term "hearing officer."¹⁵² Think of all the boards and commissions that perform quasi-judicial activities without the benefit of lawyer decision makers.¹⁵³ Also, I refer the reader to my least favorite unauthorized practice opinion, KBA U-34 (1981).¹⁵⁴ That curious opinion came out of the university setting, and held that non-lawyer students and faculty may not represent others in university grievance and disciplinary proceedings.¹⁵⁵

¹⁴⁷ *Id.* The power to disqualify counsel is thought to be inherent in every tribunal, and is implied by statutes that prohibit conflicts of interest, [e.g. Rules of Professional Conduct] and requirements of due process. *Id.* (citing *Brown v. District of Columbia Board of Zoning Adjustment*, 413 A.2d 1276 (D.C. App. 1980)).

¹⁴⁸ See KY. REV. STAT. ANN. § 13B.080 (6) (Michie 1996).

¹⁴⁹ See *Ky. Bar Ass'n v. Nall*, 599 S.W.2d 899 (Ky. 1980). See also KENTUCKY CODE OF JUDICIAL CONDUCT, SUP. CT. R. 4.300, Canon 3 D (2), KY. RULES ANN. Vol. 2 (Michie 2001) and the identical provisions of the Kentucky Association of Administrative Adjudicator's Proposed Code of Judicial Conduct for Hearing Officers. See CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS § 3 D (2) (Ky. Ass'n of Admin. Adjudicators, Proposed 2001), reprinted in Appendix. See also the National Association of Hearing Officers Model Code, Section X: Compliance with Ethical Rules: "Hearing officials have a duty to report ethical violations." MODEL CODE OF ETHICS § X (Nat'l Ass'n of Hearing Officers), available at <http://www.naho.org/code_of_ethics.htm>.

¹⁵⁰ See Levinson, *supra* note 3, at 243-44.

¹⁵¹ See Levinson, *supra* note 3, at 260 (citing, among other cases and materials, *Schweiker v. McClure*, 456 U.S. 188 (1982)).

¹⁵² See CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS (Ky. Ass'n of Admin. Adjudicators, Proposed 2001) (stating: "'Hearing officer' includes any person to whom the authority to conduct an administrative adjudication has been delegated by the administrative agency or by statute.") (emphasis added), reprinted in Appendix.

¹⁵³ See e.g., Kentucky's state licensing boards, local planning and zoning boards, etc.

¹⁵⁴ See *Ky. Bar Ass'n Unauthorized Practice Comm. Op. U-34* (1981).

¹⁵⁵ See *id.* This opinion was in direct conflict with law school honor code rules, which allowed students to represent other students in proceedings.

However, the opinion also seems to assume that a non-lawyer might be the hearing officer.¹⁵⁶ Specifically, it stated that *if the hearing officer is a lawyer* (but presumably not otherwise), he or she must report non-lawyers who are attempting to appear and play lawyer, or risk being charged with aiding the unauthorized practice of law.¹⁵⁷

In Kentucky the unauthorized practice rule, SCR 3.020 (Practice of Law defined) is spectacularly broad: "The practice of law is any service rendered involving legal knowledge or legal advice, whether representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the service"¹⁵⁸ So far the KBA Unauthorized Practice Committee has not attempted to "outlaw" non-lawyer hearing officers, but it may be a temptation.¹⁵⁹

I do think it is interesting that KRS 13B.030 (2) (b) allows an agency to contract "with private attorneys" in order to secure hearing officers if the Attorney General can't provide them.¹⁶⁰ Does that mean that being an attorney is a minimum qualification? Apparently not. KRS 13B.030 (3) states: "A hearing officer shall possess and meet qualifications as the Personnel Cabinet and the employing agency, with the advice of the division, may find necessary to assure competency in the conduct of an administrative hearing."¹⁶¹ KRS 13B.030 (4) then goes on to require no more than 18 hours of initial training plus six hours of additional annual training.¹⁶² The Attorney General has issued regulations clarifying the nature of this training.¹⁶³ Professor Levinson argues that non-lawyer hearing officers or ALJ's should be required (by the employing agency or central panel chief) to follow the same standards as lawyer hearing officers or ALJs even if they are not subject to bar association discipline.¹⁶⁴

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* See also KY. RULES OF PROFESSIONAL CONDUCT Rule 5.5 (b), SUP. CT. R. 3.130, KY. RULES ANN. Vol. 2 (Michie 2001) (prohibiting a lawyer from assisting "a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.").

¹⁵⁸ SUP. CT. R. 3.020, KY. RULES ANN. Vol. 2 (Michie 2001).

¹⁵⁹ One interesting example suffices to illustrate the possibility of abuse under the rule. Many years ago Elvis Stahr, Jr., who was something of a Kentucky luminary, became Dean of the University of Kentucky College of Law. He was invited to join the bar, but under the terms of the admissions rules he would have had to take the bar examination (horrors!). To facilitate his admission on motion, the rules were changed to count years of prior law teaching as years of practice for "experience purposes". (My source for this background information was Professor Paul Oberst, who retired some years back.) Unfortunately, the rule as amended has led some to assume that since "law teaching is law practice," then it must follow that all law teachers in Kentucky must be admitted to the Kentucky Bar. Again, this was not the intent of the rule, and one doubts the power of the bar to enforce such an interpretation. In any event, the notion that only members of the Kentucky Bar Association may teach law in Kentucky only comes up when some unfortunate professor makes some lawyer or judge mad. Kentucky's Supreme Court Rules include instructors or professors of law in Kentucky law schools as a form of the practice of law. See SUP. CT. R. 3.022 (c), KY. RULES ANN. Vol. 2 (Michie 2001).

¹⁶⁰ See KY. REV. STAT. ANN. § 13B.030 (2) (b) (Michie 1996 & Supp. 2000).

¹⁶¹ KY. REV. STAT. ANN. § 13B.030 (3) (Michie Supp. 2000).

¹⁶² See KY. REV. STAT. ANN. § 13B.030 (4) (Michie Supp. 2000).

¹⁶³ See 40 KY. ADMIN. REGS. 5:010 (2001).

¹⁶⁴ See Levinson, *supra* note 3, at 260.

B. Lay Representation

KBA Opinion U-27 (1980) reiterated the longstanding position of the Court¹⁶⁵ and the Unauthorized Practice Committee that non-attorneys, and non-attorney employees of corporations, cannot represent other persons, including their own employer corporation, in administrative adjudication.¹⁶⁶ Kentucky law on this point is different from the law of some surrounding states.¹⁶⁷ I advised the hearing officer trainees to keep this opinion in their "bench books."

C. Authorizing Practice and the Separation of Powers

In Kentucky, there have been a number of fights over the power of the legislative and executive branches to "authorize" lay representation in administrative adjudication. In every case, the Unauthorized Practice Committee and the Supreme Court have stuck to their guns, opining that such efforts violate the constitutional principle of separation of powers.¹⁶⁸ The most recent pronouncement of the principle came in *Turner v. Kentucky Bar Association*,¹⁶⁹ in which the Court held that KRS 342.320(9),¹⁷⁰ which authorized non-lawyers to represent injured workers, employers, and insurance carriers in proceedings before the Department of Worker's Claims, was unconstitutional.¹⁷¹

D. Foreign Lawyers and Local Counsel

KBA U-27 also addressed the issue of representation by lawyers who are not admitted in Kentucky.¹⁷² The Unauthorized Practice Committee opined that

¹⁶⁵ See *Ky. State Bar Ass'n v. Henry Vogt Machine Co.*, 416 S.W.2d 727 (Ky. 1967) (holding that a director of personnel who appeared for his company at a hearing before the Unemployment Insurance Commission was guilty of the unauthorized practice of law).

¹⁶⁶ See *Ky. Bar Ass'n Unauthorized Practice Comm. Op. U-27* (1980).

¹⁶⁷ See ABA/BNA LAW. MAN. PROF. CON. 21:8010 (1999) (citing an *ABA 1999 Survey Of Unauthorized Practice Of Law Committees*, which reports that 11 out of 34 states responding reported that they allow nonlawyers to appear as representatives before state administrative agencies).

¹⁶⁸ See, e.g., *Ky. Bar Ass'n Unauthorized Practice Comm. Op. U-48* (1995) (dealing with the issue of insurance adjusters attempting to handle cases for members of the public under the authority of KRS 304.9-070 and KRS 304.9-430. The opinion states: "The legislature cannot authorize conduct in violation of SCR 3.020. That is a matter for the Supreme Court."). *Id.*, reprinted in Richard Underwood, *Advisory Ethics Opinions*, 43, 47 KY. BENCH & BAR (Fall 1995).

¹⁶⁹ 980 S.W.2d 560 (Ky. 1998). The opinion was rendered on review of an unauthorized practice opinion, *Ky. Bar Ass'n Unauthorized Practice Comm. Op. U-52* (1997), reprinted in Marcus Carey, *Unauthorized Practice Opinions*, 54, 55 KY. BENCH & BAR (Summer 1997). The opinion in *Turner* made a big point of saying that "as the Supreme Court has no regulatory control over non-attorneys, [the lay worker's compensation specialists would [have] provide[d] legal representation without being subject to the professional standards applied to lawyers." *Id.* at 562. However, the Court then said it would allow such specialists to work, in essence, as "paralegals" under the direct supervision of licensed counsel. See *id.*

¹⁷⁰ See KY. REV. STAT. ANN. § 342.320 (9) (Michie 1997).

¹⁷¹ See *Turner v. Ky. Bar Ass'n*, 980 S.W.2d 560, 563 (Ky. 1998).

¹⁷² See *Ky. Bar Ass'n Unauthorized Practice Comm. Op. U-27* (1980). See also text accompanying note 164.

in Kentucky administrative proceedings, non-admitted lawyers must comply with SCR 3.030(2) which provides:

A person admitted to practice in another state, but not in this state, shall be permitted to practice a case in this state only if he subjects himself to the jurisdiction and Rules of the Court covering professional conduct and engages a member of the association as co-counsel, whose presence shall be necessary at all trials and at other times when required by the court.¹⁷³

Does that mean that local counsel must be present during the hearing, performing a sort of "sergeant-at-arms" role? Presumably local counsel has some responsibility for the conduct of his non-admitted co-counsel.¹⁷⁴ Indeed the justifications for requiring local counsel are supposedly to insure that a lawyer familiar with the nuances of Kentucky procedure, and a lawyer fully subject to bar discipline, will be present or available.¹⁷⁵ This would call for the presence of local counsel. On the other hand, some hearing officers may share my view that the presence of local counsel throughout the proceedings may not be necessary, and may impose unnecessary expense on a party. I am inclined to think that *most* foreign counsel will do a competent job, and that *most* of them won't run amok. Furthermore, it has been suggested that the language of SCR 3.030(2), which refers to "all trials," might not include "hearings." These are arguments in support of giving the hearing officer some discretion in the matter.

E. Discipline of Laymen and Foreign Lawyers

Parties and persons appearing *pro se* may be controlled by default orders and the like.¹⁷⁶ In states where agencies are permitted to authorize the practice by non-lawyers (again, Kentucky is not such a state) the agencies have the power to establish and enforce standards of conduct for non-lawyers.¹⁷⁷ These standards

¹⁷³ SUP. CT. R. 3.030 (2), KY. RULES ANN. Vol. 2 (Michie 2001).

¹⁷⁴ See, e.g., KY. RULES OF CIVIL PROCEDURE Rule 11, KY. RULES ANN. Vol. 1 (Michie 2001). See also KY. RULES OF PROFESSIONAL CONDUCT Rule 5.1 (b), (c), SUP. CT. R. 3.130, KY. RULES ANN. Vol. 2 (Michie 2001) (stating: (b) "A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct only if . . ."). See also KY. RULES OF PROFESSIONAL CONDUCT Rule 5.2 (a), (b), SUP. CT. R. 3.130, KY. RULES ANN. Vol. 2 (Michie 2001):

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person. (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Id.

¹⁷⁵ Some say that the real purpose is Kentucky lawyer full employment. People can be so cynical.

¹⁷⁶ See *supra* text accompanying note 146.

¹⁷⁷ See KOCH, *supra* note 42, § 6.24 (3).

should be the same as the standards for lawyers, at least insofar as the rules relate to the fair conduct of the proceeding.¹⁷⁸

Foreign lawyers admitted *pro hoc vice* can be controlled by default orders and exclusion. Their misconduct can also be referred to their own bar associations.¹⁷⁹ By appearing before a Kentucky agency, with the assistance of local counsel, a foreign lawyer agrees to abide by the Kentucky Rules of Professional Conduct, and any disciplinary tribunal to which the matter is referred should apply the Kentucky Rules of Professional Conduct to the lawyer's conduct.¹⁸⁰ While it is true that the Kentucky Bar Association has no ability to discipline a layman or a foreign lawyer directly, the power to exclude the representative, punish the representative's client through default orders, or refer the matter to an appropriate disciplinary authority are sufficient to curb unethical conduct.

V. CONCLUSIONS

In this brief survey I have summarized the Kentucky law relating to bias and disqualification of administrative adjudicators, and the prohibition of *ex parte* communications. I have also reviewed the ethical rules relating to the conduct of representatives appearing before administrative adjudicators, and the rules relating to admission and unauthorized practice.

Kentucky took a big step forward when it adopted a uniform administrative hearing act¹⁸¹ and created what amounts to a small central panel of full-time hearing officers. Although many agencies are exempted from the act, the statute does provide a model, and the case law that develops around this model will provide much needed guidance. It is also possible that individual agencies and the Chief Hearing Officer of the Division of Administrative Hearings will adopt a version of the Code of Judicial Conduct to supplement the statutory rules relating to disqualification of, and ethical conduct of, hearing officers.

Given the vigor with which Kentucky's unauthorized practice rule is enforced and the inability of Kentucky agencies to authorize lay practice, the statutory preference for lawyer-hearing officers, and the mandatory training

¹⁷⁸ See Levinson, *supra* note 3, at 264.

¹⁷⁹ See KY. RULES OF PROFESSIONAL CONDUCT Rule 8.4 cmt. 1, SUP. CT. R. 3.130, KY. RULES ANN. Vol. 2 (Michie 2001) ("In modern practice lawyers frequently act outside the territorial limit of the jurisdiction in which they are licensed to practice In doing so, they remain subject to governing authority of the jurisdiction in which they are licensed to practice.").

¹⁸⁰ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 (b) (1) (2000):

In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a proceeding in a court before which the lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise

Id.

¹⁸¹ See KY. REV. STAT. ANN. §§ 13B.005-13B.170 (Michie 1996 & Supp. 2000).

supplied by the Attorney General's office, we can expect an increase of professionalism in administrative proceedings.

APPENDIX

PROPOSED CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS KENTUCKY ASSOCIATION OF ADMINISTRATIVE ADJUDICATORS

The Ethics Canon Committee

Canon 1: A hearing officer shall uphold the integrity and independence of the administrative judiciary.

Canon 2: A hearing officer shall avoid impropriety and the appearance of impropriety in all of the hearing officer's activities.

Canon 3: A hearing officer shall perform the duties of office impartially and diligently.

Canon 4: A hearing officer shall so conduct the hearing officer's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

Canon 5: A hearing officer shall refrain from inappropriate political activity.

PREAMBLE

Our legal system is based on the principle that an independent, fair, and competent administrative judiciary will interpret and apply the laws that govern us. The role of the administrative judiciary is central to American and Kentucky concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that hearing officers, individually and collectively, must respect and honor their office as a public trust and strive to enhance and maintain confidence in our legal system. The hearing officer is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct for Hearing Officers is intended to establish standards for ethical conduct of hearing officers. The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, administrative rules, and decisional law, and in the context of all relevant circumstances, including the varying degrees of responsibility and administrative functions of different hearing officers. The Code is to be construed so as not to impinge on the essential discretion of hearing officers in making judicial decisions.

The Code of Judicial Conduct for Hearing Officers is not intended as an exhaustive guide for the conduct of hearing officers. Hearing officers should also be governed in their judicial and personal conduct by general ethical standards.

The Code is intended, however, to state basic standards which should govern the conduct of all hearing officers and to provide guidance to assist hearing officers in establishing and maintaining high standards of judicial and personal conduct.

The Code of Judicial Conduct for Hearing Officers is based on the Kentucky Code of Judicial Conduct and should be interpreted when appropriate in accordance with the opinions and commentary for the Kentucky Code of Judicial Conduct.

TERMINOLOGY

"*De minimis*" denotes an insignificant interest that could not raise reasonable question as to a hearing officer's impartiality.

"Economic interest" denotes ownership of a more than *de minimis* legal or equitable interest, or a relationship as officer, director, advisor, or other active participant in the affairs of a party, except that:

- (i) ownership of an interest in a mutual or common investment fund that hold securities is not an economic interest in such securities unless the hearing officer participates in the management of the fund or a proceeding pending or impending before the hearing officer could substantially affect the value of the interest;
- (ii) service by a hearing officer as an officer, director, advisor, or other active participant in an educational, religious, charitable, fraternal, or civic organization, or service by a hearing officer's spouse, parent, or child as an officer, director, advisor, or other active participant in any organization does not create an economic interest in securities held by that organization;
- (iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the hearing officer could substantially affect the value of the interest;
- (iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the hearing officer could substantially affect the value of the securities.

"*Ex parte* communication" means the hearing officer's communication off the record with any party to the administrative proceeding, or with any other person who has a direct or indirect interest in the outcome of the administrative proceeding, concerning any substantive issue, while the proceeding is pending.

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.

"Invidious discrimination" includes any action by an organization that appears to regard some immutable individual trait, such as a person's race, gender, religion, or national origin, as odious or inferior, which is used to justify arbitrary exclusion of persons possessing those traits from membership or participation in the organization. On the other hand, organization dedicated to the preservation of religions, fraternal sororal, spiritual, charitable, civic, or cultural values, which do not stigmatize any excluded persons as inferior and therefore unworthy of membership, are not considered to discriminate invidiously.

"Judicial duties" include all the duties of the hearing officer's office prescribed by law.

"Hearing officer" includes any person to whom the authority to conduct an administrative adjudication has been delegated by the administrative agency or by statute.

"Knowingly," "knowledge," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Law" denotes statutes, administrative rules, constitutional provisions, and decisional law.

"Member of the hearing officer's family" denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the hearing officer maintains a close familial relationship.

"Member of the hearing officer's family residing in the hearing officer's household" denotes any relative of a hearing officer by blood or marriage, or a person treated by a hearing officer as a member of the hearing officer's family, who resides in the hearing officer's household.

"Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

"Require." The rules prescribing that a hearing officer "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a hearing officer is to exercise reasonable direction and control over the conduct of those persons subject to the hearing officer's direction and control.

"Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece.

CANON 1

CANON 1: A hearing officer shall uphold the integrity and independence of the administrative judiciary.

An independent and honorable administrative judiciary is indispensable to justice in our society. A hearing officer should actively participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the administrative judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

CANON 2

CANON 2: A hearing officer shall avoid impropriety and the appearance of impropriety in all of the hearing officer's activities.

1. A hearing officer shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary.
2. A hearing officer may properly lend the prestige of the hearing officer's office to advance the public interest in the administration of justice.
3. A hearing officer may actively support public agencies or interests or testify voluntarily on public matters concerning the law, the legal system, the provision of legal services, and the administration of justice.
4. A hearing officer shall not lend the prestige of judicial office to advance the private interest of the hearing officer or others; nor shall a hearing officer convey or permit others to convey the impression that others are in a special position to influence the hearing officer.
 - (i) A hearing officer shall not allow family, social, political, or other relationships to impair the hearing officer's objectivity.
 - (ii) A hearing officer shall not testify voluntarily as a character witness.
5. A hearing officer shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

CANON 3

CANON 3: A hearing officer shall perform the duties of office impartially and diligently.

6. **Judicial Duties in General.** The judicial duties of a hearing officer take precedence over all the hearing officer's other activities. In the performance of these duties, the following standards apply.
7. **Adjudicative Responsibilities**
 - (1) A hearing officer shall hear and decide matters assigned to the hearing officer, except those matters in which disqualification is required.
 - (2) A hearing officer shall be faithful to the law and maintain professional competence in it. A hearing officer shall not be swayed by partisan interests, public clamor, or fear of criticism.
 - (3) A hearing officer shall require order and decorum in proceedings before the hearing officer.
 - (4) A hearing officer shall be patient, dignified, and courteous to litigants, witnesses, lawyers, and others with whom the hearing officer deals in an official capacity, and shall require similar conduct of participants in proceedings before the hearing officer, and of staff members and others subject to the hearing officer's direction and control.
 - (5) A hearing officer shall perform judicial duties without bias or prejudice. A hearing officer shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not, in proceedings before the hearing officer, permit staff members and others subject to the hearing officer's direction and control to do so.
 - (6) A hearing officer shall require the participants in proceedings before the hearing officer to refrain from manifesting by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others. This Section does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or other similar factors, are issues in the proceeding.
 - (7) A hearing officer shall accord to every person who has a legal interest in a proceeding, or that person's lawyer or

representative, the right to be heard according to law. With regard to a pending or impending proceeding, a hearing officer shall not initiate, permit, or consider *ex parte* communications.

- (a) If an *ex parte* communication occurs, the hearing officer shall note the occurrence for the record, and the hearing officer shall place in the record a copy of the communication, if it was written, or a memorandum of the substance of the communication, if it was oral.
 - (b) As a part of legal research, a hearing officer may obtain the advice of a disinterested expert on the law applicable to a proceeding before the hearing officer.
 - (c) A hearing officer may consult with support personnel whose function is to aid the hearing officer in carrying out the hearing officer's adjudicative responsibilities or with other hearing officers.
 - (d) A hearing officer may, with the consent of the parties, confer separately with the parties and their lawyers or representatives in an effort to mediate or settle matters pending before the hearing officer.
 - (e) A hearing officer may initiate or consider any *ex parte* communications when expressly authorized by law to do so.
- (8) A hearing officer shall dispose of all judicial matters promptly, efficiently, and fairly.
- (9) A hearing officer shall not, while a proceeding is pending or impending in any administrative forum or court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any non-public comment that might substantially interfere with a fair hearing. The hearing officer shall require similar abstention on the part of staff members subject to the hearing officer's direction and control. This Section does not prohibit hearing officers from making public statements in the course of their official duties or from explaining for public information the procedures of the administrative body. This Section does not apply to proceedings in which the hearing officer is a litigant in a personal capacity.-
- (10) A hearing officer shall not commend or criticize an agency head for its decision other than in an opinion in a proceeding.
- (11) A hearing officer shall not disclose or use, for any purpose

unrelated to judicial duties, information acquired in a judicial capacity that by law is not available to the general public.

- (12) A hearing officer should not be subject to the authority, direction, or discretion of a person who has served as an investigator, prosecutor, or advocate in a proceeding before the hearing officer, or in any pre-adjudicative stage of the proceeding

8. Administrative Responsibilities

- (1) A hearing officer shall diligently discharge the hearing officer's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other hearing officers and staff members in the administration of the hearing officer's duties.
- (2) A hearing officer shall require staff members and those subject to the hearing officer's direction and control, and should encourage other administrative officials, to observe the standards of fidelity and diligence that apply to the hearing officer and to refrain from manifesting bias or prejudice in the performance of their official duties.
- (3) A hearing officer with supervisory authority for the performance of other hearing officers shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

9. Disciplinary Responsibilities

- (1) A hearing officer who receives information indicating a substantial likelihood that another hearing officer has committed a violation of this Code should take appropriate action. A hearing officer having knowledge that another hearing officer has committed a violation of this Code that raises a substantial question as to the other hearing officer's fitness for office should inform the appropriate authority.
- (2) A hearing officer who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Kentucky Rules of Professional Conduct should take appropriate action. A hearing officer having knowledge that a lawyer has committed a violation of the Kentucky Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects should inform the appropriate authority.

10. Disqualification

- (1) A hearing officer shall disqualify himself or herself in a proceeding in which the hearing officer's impartiality might reasonably be questioned, including but not limited to instances where:
 - (a) the hearing officer has a personal bias or prejudice concerning a party or a party's lawyer or representative, or personal knowledge of disputed evidentiary facts concerning the proceeding;
 - (b) the hearing officer served as a lawyer or representative in the matter in controversy, or a lawyer with whom the hearing officer previously practiced law served during such association as a lawyer concerning the matter, or the hearing officer has been a material witness concerning it;
 - (c) the hearing officer knows that he or she, individually or as a fiduciary, or the hearing officer's spouse, parent, or minor child residing in the hearing officer's household, has any interest, more than a *de minimis* interest, in the subject matter in controversy or in a party to the proceeding that could be substantially affected by the proceeding;
 - (d) the hearing officer or the hearing officer's spouse, or a person within the third degree of relationship to either of them or the spouse of such a person:
 - (i) is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) is acting as a lawyer or representative in the proceeding;
 - (ii) is known by the hearing officer to have a more than *de minimis* interest that could be substantially affected by the proceedings;
 - (iii) is to the hearing officer's knowledge likely to be a material witness to the proceeding.
- (2) A hearing officer shall keep informed about the hearing officer's personal and fiduciary economic interest, and make a reasonable effort to keep informed about the personal economic interests of the hearing officer's spouse and minor children residing in the hearing officer's household.

11. **Remittal of Disqualification.** A hearing officer disqualified by the terms of Canon 3E may disclose on the record the basis of the hearing officer's disqualification and may ask the parties and their lawyers or representatives to consider, out of the presence of the hearing officer, whether to waive disqualification. If following disclosure of any basis for disqualification, other than personal bias or prejudice concerning a party, the parties and lawyers or representative, without participation by the hearing officer, all agree that the hearing officer should not be disqualified, and the hearing officer is then willing to participate, the hearing officer may participate in the proceeding. The agreement, signed by all parties and lawyers or representatives, shall be incorporated in the record of the proceeding.

CANON 4

CANON 4: A hearing officer shall so conduct the hearing officer's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

12. **Extra-Judicial Activities in General.** A hearing officer shall conduct all of the hearing officer's extra-judicial activities so that they do not:
 - (1) cast reasonable doubt on the hearing officer's capacity to act impartially as a hearing officer;
 - (2) demean the judicial office; or
 - (3) interfere with the performance of judicial duties.
13. **Avocational Activities.** A hearing officer may speak, write, lecture, teach, and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice, and non-legal subjects, subject to the requirements of this Code.
14. **Governmental, Civic, and Charitable Activities.**
 - (1) A hearing officer may appear at a hearing before an executive or legislative body or official and may otherwise consult with an executive or legislative body or official, under the following circumstances:
 - (a) if the appearance or consultation is not otherwise prohibited by law or by any other provision of this Code;
 - (b) if the appearance or consultation casts no doubt on the hearing officer's capacity to decide impartially any issue that may come before the hearing officer; and

- (c) if the appearance or consultation includes no matter that is likely to come before the administrative agency for which the hearing officer serves as hearing officer.
- (2) A hearing officer shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters that will come before the hearing officer or that will come before the administrative body for which the hearing officer serves as hearing officer. A hearing officer may accept appointment to a governmental committee or commission where an appointment of a hearing officer to the governmental committee is authorized or required by law or where the governmental committee or commission involves the improvement of the law, the legal system, or the administration of justice. A hearing officer may represent a country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities.
- (3) A hearing officer may serve as an officer, director, trustee, or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice, or of an educational, religious, charitable, fraternal, or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.
 - (a) A hearing officer shall not serve as an officer, director, trustee, or non-legal advisor if it is likely that the organization:
 - (i) will be engaged in proceedings that would ordinarily come before the hearing officer or the administrative body for which the hearing officer serves as hearing officer; or
 - (ii) by reason of its purpose, will have a substantial interest in other proceedings in the administrative body for which the hearing officer serves as hearing officer.
 - (b) A hearing officer as an officer, director, trustee, or non-legal advisor, or as a member or otherwise:
 - (i) may assist such an organization in planning fund raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities;

- (ii) may make recommendations to public and private fund granting organizations on projects and programs concerning the law, the legal system, or the administration of justice;
- (iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Canon 4C(3)(b)(i), if the membership solicitation is essentially a fund raising mechanism;
- (iv) shall not use or permit the use of the prestige of judicial office for fund raising or membership solicitation.

15. Financial Activities

- (1) A hearing officer shall not engage in financial and business dealings that:
 - (a) may reasonably be perceived to exploit the hearing officer's position, or
 - (b) involve the hearing officer in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the administrative body for which the hearing officer serves as hearing officer.
- (2) A hearing officer may, subject to the requirements of this Code, hold and manage investments of the hearing officer and members of the hearing officer's family, including real estate, and engage in other remunerative activity.
- (3) A hearing officer may serve as an officer, director, manager, general partner, advisor, or employee of any business entity subject to the following limitations and the other requirements of this Code:
 - (a) A hearing officer shall not be involved in any business entity:
 - (i) held in disrepute in the community; or
 - (ii) likely to be engaged in proceedings that would ordinarily come before the hearing officer or the administrative body for which the hearing officer services as hearing officer.

- (b) A hearing officer involved with any business entity may assist such a business entity in planning fund raising and may participate in the management and investment of the entity's funds, but shall not personally participate in the solicitation of funds, the raising of capital, or the selling of stock in such a manner as to use or permit the use of the prestige of judicial office for promotion of the business entity.
- (4) A hearing officer shall manage the hearing officer's investment and other financial interests to minimize the number of cases in which the hearing officer is disqualified. As soon as the hearing officer can do so without serious financial detriment, the hearing officer shall divest himself or herself of investments and other financial interests that might require frequent disqualification.
- (5) A hearing officer shall not accept, and shall urge members of the hearing officer's family residing in the hearing officer's household not to accept, a gift, bequest, favor, or loan from anyone except for:
 - (a) a gift incident to a public testimonial, books, tapes, and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the hearing officer and the hearing officer's spouse or guest to attend a bar related function or an activity devoted to the improvement of the law, the legal system, or the administration of justice;
 - (b) a gift, award, or benefit incident to the business, profession, or other separate activity of a spouse or other family member of a hearing officer residing in the hearing officer's household, including gifts, awards, and benefits for the use of both the spouse or other family member and the hearing officer (as spouse or family member), provided the gift, award, or benefit could not reasonably be perceived as intended to influence the hearing officer in the performance of judicial duties;
 - (c) ordinary social hospitality or customary expressions of sympathy;
 - (d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship;

- (e) a gift, bequest, favor, or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Canon 3E;
- (f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not hearing officers;
- (g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or
- (h) any other gift, bequest, favor, or loan, only if: the donor is not party or other person who has come or is likely to come or whose interests have come or are likely to come before the hearing officer.

16. Fiduciary Activities

- (1) A hearing officer may serve as executor, administrator, or other personal representative, trustee, guardian, attorney in fact, or other fiduciary, only if such service will not interfere with the proper performance of the hearing officer's duties.
- (2) The same restriction on financial activities that apply to a hearing officer personally also apply to the hearing officer while acting in a fiduciary capacity.

17. Service as Arbitrator or Mediator. A hearing officer may act as an arbitrator or a mediator if such activity does not affect the independent professional judgment of the hearing officer or the conduct of the hearing officer's official duties. A hearing officer shall not act as an arbitrator or a mediator in a matter over which the hearing officer may later preside.

18. Practice of Law.

- (1) A hearing officer may practice law if such activity would affect neither the independent professional judgment of the hearing officer nor the conduct of the hearing officer's official duties, and if such activity would not violate any other provisions of this Code.
- (2) A hearing officer shall not accept the representation of a client who is a litigant before the administrative body for which the hearing officer serves as hearing officer or if there is a likelihood that such person will appear before the hearing officer.

- (3) The hearing officer shall not practice law before the administrative body for which the hearing officer serves as hearing officer.

19. Compensation and Reimbursement. A hearing officer may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the hearing officer's performance of judicial duties or otherwise give the appearance of impropriety.

- (1) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a hearing officer would receive for the same activity.
- (2) Expense reimbursement shall be limited to the actual cost of travel, food, and lodging reasonably incurred by the hearing officer and, where appropriate to the occasion, by the hearing officer's spouse or guest. Any payment in excess of such an amount is compensation.

I. Disclosure of a hearing officer's income, debts, investment, or other assets is required only to the extent provided in this Canon and in Canon 3E and F, or as otherwise required by law.

CANON 5

CANON 5: A hearing officer shall refrain from inappropriate political activity.

20. Political Conduct in General

- (1) A hearing officer shall not:
 - (a) act as a leader or hold any office in a political organization;
 - (b) make speeches for or against a political organization or candidate or publicly endorse or oppose a candidate for public office;
 - (c) solicit funds for or pay an assessment to a political organization or candidate.
- (2) A hearing officer may engage in political activity on behalf of measures to improve the law, the legal system, or the administration of justice, as provided in Canon 2B and C.